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Supreme Court of the United States

OCTOBER TERM, 1987

STEVEN ANTHONY PENSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

On Writ of Certiorari
to Court of Appeals of
Montgomery County, Ohio

Brief of the Ohio Association of Criminal Defense Lawyers Amicus Curiae in Support of Petitioner

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INTEREST OF AMICUS CURIAE

The Ohio Association of Criminal Defense Lawyers is a statewide organization of more than four-hundred (400) attorneys specializing in the practice of criminal law. The organization is affiliated with the National Association of Criminal Defense Lawyers and it has been formed for charitable, scientific and educational purposes including the proper administration of justice and research in the field of criminal defense law.

The membership of the Ohio Association of Criminal Defense Lawyers includes both private practitioners and public defenders. The Ohio Association of Criminal Defense Lawyers, through its membership, has a presence in each of Ohio's twelve appellate districts. Many of these attorneys have assisted in this brief by gathering data and researching the files located in the various counties where these cases originated. This statewide presence gives the Ohio Association of Criminal Defense Lawyers the unique ability to gather and present data to this Court that would otherwise remain hidden from review due to the difficulty and expense of collection.

With the consent of the parties, as indicated by letters lodged with the Clerk of this court, the Ohio Association of Criminal Defense Lawyers respectfully submit this brief in support of petitioner.

QUESTION PRESENTED

When A State Court Of Appeals Determines That There Are Arguable Issues That Could Be Raised On Appeal, Is The State Court Of Appeals Required To Provide Counsel To An Indigent Appellant Before Reviewing The Case And Deciding The Merits?

SUMMARY OF THE ARGUMENT

Substantial equality and fair process are constitutional requirements. They compel a special procedure when appointed counsel deems frivolous an indigent's appeal of right in a criminal case. This is the constitutional mandate of *Anders v. California*, 386 U.S. 738 (1967). The experience in Ohio is that assigned counsels' obligations under *Anders* have not been enforced by the courts. In addition, the appellate courts have also failed to live up to their obligations under *Anders*. Most significantly, the appellate courts have identified arguable claims in numerous cases yet failed to require counsel to brief these issues before reaching the merits.

Understandable economic forces have caused this noncompliance. These same forces have eroded the distinction between appeals which are frivolous and those which are simply unlikely to result in reversal of the conviction. The expanded definition of "frivolous appeal" encompasses virtually all criminal appeals. Because appeals labeled frivolous are less thoroughly examined, there has been an overall degradation in the quality of review afforded indigent criminal appellants as a class.

The proper definition of a frivolous appeal is far narrower. An appeal is truly frivolous if, and only if, there is no rational argument to be made on the law or the facts. An appeal is not frivolous merely because an inadequately compensated appointed attorney believes that the case contains no issue which is likely to warrant reversal of the conviction. A truly frivolous appeal has no issue supported by the factual or procedural history of the case and is not of sufficient stature to warrant argument for a change in well settled law.

In all other situations the appellate courts should refuse appellate counsels' requests to withdraw and direct that the issues be briefed in the traditional adversarial manner. Appellate courts should specifically decline counsels' invitation to "independently review the record" except in those rare cases where the appeal is properly defined as frivolous.

ARGUMENT

I. The Ohio Courts' Failure To Require Strict Compliance With The Requirements Set Forth In *Anders v. California* Results In Unequal Treatment For Indigent Appellants And An Overall Degradation In The Quality Of Appellate Review.

An appeal is frivolous only when there is no rational argument to be made upon the law or the facts. *Coppedge v. U.S.* 369 U.S. 438, 448 (1962). This definition of frivolity developed out of a line of cases dealing with indigent federal appellants who were denied leave to appeal in *forma pauperis.* This Court has consistently held that:

> Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant...the request for leave to appeal in forma pauperis must be allowed.

Ellis v. U.S., 356 U.S. 674, 675 (1958).

The Constitution requires an appellate process open to both rich and poor on an equal basis. *Griffin v. Illinois,* 351 U.S. 12, 18-19 (1956). This requires the appointment of counsel for an indigent upon direct appeal. *Douglas v. California,* 372 U.S. 353 (1963). More than merely nominal representation is required. Every appellant is entitled

to the effective assistance of counsel on direct appeal.[1] *Evitts v. Lucey,* 469 U.S. 387 (1985). In order for counsel to be minimally effective in the constitutional sense he must play, "...the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." *Anders* at 744. By definition an advocate advances and argues rational issues on behalf of his client.

In a very small number of cases there is simply no issue at all supported by the facts or procedural history of the case. *Anders* recognized this fact and in *dicta* described the procedure to be employed in such situations:

> Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.

386 U.S. at 744.

This aspect of the *Anders* dicta, the briefing requirement, has been the subject of extensive criticism.[2] The experience in Ohio is that this requirement is often ignored. Nor do

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[1]At least minimally effective representation at this level is crucial since the indigent is entitled to free representation only on the first appeal. *Ross v. Moffit,* 417 U.S. 600 (1974).

[2]See Pengilly, *Never Cry Anders,* 9 Crim. Just. J. 45 (1986); Dougherty, *Wolf! Wolf! - The Ramifications of Frivolous Appeals,* 59 J. Crim. L. & Criminology 1 (1968); Herman, *Frivolous Criminal Appeals* 47 N.Y.U. L. Rev. 701 (1972); Mendelson, *Frivolous Criminal Appeals: The Anders Brief of the Idaho Rule?,* 19 Crim. L. Bul. 22 (1983).

the courts of appeal comply with the requirement of *Anders*. *Anders* holds that after independently reviewing the case if the court is satisfied of the frivolity of the appeal, then the court may:

> ...grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a determination on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it *must*, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

386 U.S. at 744. (Emphasis added).

In a substantial number of cases since 1981 the appellate courts in Ohio have identified arguable and therefore non-frivolous issues overlooked by counsel. In each of these cases the court proceeded to make a merit decision without affording the appellant counsel to brief and argue the issue. This abuse is universal and does not appear to be correlated to the presence of a constitutionally acceptable *Anders* brief. A detailed discussion of the findings of counsels' research follows.

A. *At least six appellate districts fail to comply with one or more of the requirements set forth in Anders v. California for the provision of counsel to press non-frivolous appeals on behalf of indigent appellants. This results in unequal treatment for indigent appellants and a degradation in the overall quality of appellate review.*

Penson's appointed attorney filed a one page motion seeking leave to withdraw and certifying in a conclusory fashion that he had, "... carefully reviewed the ... record ..." but "... found no errors requiring reversal, modification

and/or vacation ...". Joint Appendix at p. 24. This is the procedure typically followed in the Montgomery County Court of Appeals.[3] The second appellate district does not require counsel to comply with the briefing requirement established by this Court in *Anders v. California*. Often issues raised by appellant *pro se* are summarily overruled without discussion.[4] The court does undertake an independent review of the record, and occasionally does identify issues which have been overlooked by assigned counsel. In none of these cases has the court directed counsel to brief and argue the issue so identified. In *State v. Day* (11-24-86) Clarke App. No. CA 2141, unreported, Appellant raised six *pro se* issues all of which were arguable albeit unlikely to succeed. The Court found the first assignment meritorious but ruled the error was harmless.

In several cases the court has allowed "briefs" which raise only arguments against the appellant. *See State v.*

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[3]See Appendix B containing all "Anders" type cases from the second appellate district since 1981. The decisions in these cases as well as the unreported cases cited in the other appendices have been lodged with the Clerk.

In the following Montgomery County cases, appellate counsel filed "no merit" letters substantially identical to that which appellate counsel filed in the *Penson* case, to wit: *State v. Dorton* (11-25-87) Mont. App. No. CA10082; *State v. Monroe* (11-27-87) Mont. App. No. CA10124. These letters are also loged with the Clerk. As it did in *Penson*, the court refers to these letters as *"Anders"* briefs.

[4]Ohio R. of App. P. 12 (A) provides that the appeal must be determined on the merits of the assignments of error set forth by the brief. This would appear to require discussion rather than summary disposition by the court, but the second appellate district has not been consistent in this respect. See, eg: *State v. Brewer* (9-26-84) Mont. App. No. CA 8661, unreported; *State v. Wilson* (7-25-84) Mont. App. No. CA 1776, unreported; *State v. Ridner* (6-22-84) Mont. App. No. CA 8648, unreported; *State v. Wilson* (12-9-85) Clarke App. No. 1942, unreported.

Crockett (2-12-84), Mont. App. No. 8180, unreported; *State v. Brewer* (9-23-84), Mont. App. No. 8661, unreported; *State v. Ridner* (3-19-84), Mont. App. No. 8648, unreported; *State v. Smith* (8-10-87), Mont. App. No. 9818, unreported.

The second appellate district is not unique in its failure to appoint counsel to brief non-frivolous issues. This problem is present in the first,[5] fourth,[6] fifth,[7] sixth,[8] seventh,[9] and twelfth[10] Appellate Districts. Counsel have collected cases in the Appendices to this brief. The cases containing arguable issues discernable from the appellate court opinion or decision itself are identified by an † at the end of the citation.

The first and twelfth appellate districts expedite disposition of these cases by use of the accelerated calendar.[11] In a substantial number of cases there is no factual discussion. The decision is styled, "Memorandum Decision and Judgment Entry" and it is often impossible to determine even such minimal information as the identity of the crime charged.

Appendix A lists forty cases from the first appellate district. Amicus have inspected the file in each case. In each of these cases the court has described that which was

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[5]See Appendix A.
[6]See Appendix C.
[7]See Appendix D.
[8]See Appendix E.
[9]See Appendix F.
[10]See Appendix G.
[11]Ohio R. App. P. 11.1 provides in pertinent part, that:

> The accelarated calendar is designed to provide a means to eliminate delay and unnecessary expense in effecting a just decision on appeal by the recognition that some cases do not require as extensive or time consuming procedure as others.

filed by counsel as a "brief." However, these pleadings are simply factual discussions followed by a conclusion that no meritorious issue can be discerned. Counsel then invites independent review by the court. No issue is presented nor is any argument advanced on behalf of the client.

Independent review is undertaken and this occasionally results in the identification of issues overlooked by counsel.[12] However, no court has ever required counsel to brief an issue so identified by the court.

The failure to require briefs by counsel prior to reaching the merits has resulted in clearly erroneous judgments in several cases. Thus, in *State v. Yonus* (8-31-83) War. App. No. CA124, unreported, the court overruled three *pro se* assignments finding that they had no merit and were therefore frivolous.[13] In one assignment appellant complained that the state was allowed to introduce evidence of prior convictions during the state's case in chief and before the defendant had testified. The court found this issue frivolous. According to the court, carrying a weapon under disability, (Ohio Revised Code §2923.13) requires proof,

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[12]In *State v. Johnson* (10-20-82) Ham. App. Nos. C810925 & 810965, two issues were raised by appellant *pro se*. The court reversed on the first assignment. The second assignment raised an ineffective assistance of appellate counsel claim. The court refused to address this issue, "... as it is not properly brought in this appeal from the actions of the court below." *Id.* at 4.

It is interesting to note that in a subsequent unreported decision this appellate court ruled that an ineffective assistance of appellate counsel claim could not be raised collaterally in a post-conviction proceeding under Ohio Rev. Code §2953.21. See *State v. Rhone* (8-31-83) Ham. App. No. C820640, unreported. This case is lodged with the Clerk. The implication seems to be that ineffective assistance of appellate counsel may not be raised either directly or collaterally in the first appellate district.

[13]See discussion infra at II.

"... that the defendant had previously been convicted of a crime of violence, to wit: breaking and entering." *Id.* at 3. However, breaking and entering (Ohio Revised Code §2911.13) is not an offense of violence under Ohio law.[14]

In *State v. Cox* (10-29-84) Cle. App. No. CA 84-04-034, unreported, counsel could find no error in the record and requested that the court conduct an independent review. The examination by the court revealed, "... the following potential error: Did the trial court err in revoking appellant's probation and imposing sentence without first having entered a judgment entry of record reflecting a finding of guilt on the part of appellant?" *Id.* at 5. This "Memorandum Decision" requires ten (10) pages to explain why this, "potential error ... did not substantially prejudice the rights of appellant." *Id.* at 8. In the course of rationalizing its decision the court revealed that appellant was granted treatment in lieu of conviction under R.C.

[14]Ohio Revised Code §2901.01(I) defines "Offense of violence" as:

(1) A violation of sections 2903.01, 2903.02, 2903.03, 2904.04, 2903.11, 2903,12, 2903.13, 2903.21, 2903.22, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.12, 2909.02, 2909.03, 2909.04, 2909.05, 2911.01, 2911.02, 2911.11, 2911.12, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.34, 2921.35, 2923.12, and 2923.13 of Revised Code;

(2) A violation of an existing or former municipal ordinance or law of this or any other state or the United States, substantially equivalent to any section listed in division (I)(1) of this section;

(3) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;

(4) A conspiracy or attempt to commit, or complicity in committing any offense under division (I)(1), (2), or (3) of this section.

§2951.041.[15] The trial court nevertheless made a verbal judgment of guilt at the hearing which was not journalized. Subsequently, two more hearings took place with the ultimate result that the defendant was ordered to serve an increased sentence of one and one half years in prison. The appellate court did not address the fundamental question of whether the trial court's failure to adhere to the statutory procedure voided the initial grant of treatment in lieu of conviction and entitled appellant to reinstatement of her not guilty plea.[16]

In *State v. White* (10-25-83) Col. App. Nos. 82-C-66 & 67, appellant was convicted of D.U.I. and falsification. The falsification charge was based upon a verbal misidentification to a police officer. However, the Ohio Supreme Court has twice held that an unsworn statement to a police officer cannot support a conviction under Ohio's falsification statute.[17]

Failure to adhere to the *Anders* requirements degrades the quality of appellate review received by the parties.

[15]Ohio law provides for two alternatives to incarceration if the court finds that the person charged with crime is or is in danger of becoming a "drug dependent person". O.R.C. §2951.041 is entitled "Treatment in lieu of conviction". This procedure takes place after a plea of guilty or no contest but before a judgment is rendered on the plea and stays the criminal proceeding. O.R.C. §2951.04 entitled "Conditional Probation of a Drug Dependent Person" is a traditional type of probation and merely stays the execution of a sentence imposed after conviction.

[16]Ohio courts have held that special statutory procedures must be strictly construed, and that a trial court's failure to comply with the procedural requirements divests the court of jurisdiction to proceed under the statute. State, ex rel. *Dallman v. Court of Common Pleas*, 32 Ohio App. 2d 102 (1972); *State v. Delaney* (1983), 9 Ohio App. 3d 97; *State v. Ellington* 36 Ohio App. 3d 76 (1987).

[17]See *Columbus v. Fisher*, 53 Ohio St. 2d 25 (1978); *Dayton v. Rogers*, 60 Ohio St. 2d 162 (1979).

Most often it is the defendant who is prejudiced. In some cases, however, it is the state. In *State v. Acklin* (9-27-84) Sum. App. No. 11679, unreported, counsel sought to withdraw and the court affirmed both the conviction (aggravated burglary and attempted rape) as well as the sentence of, "... seven to fifteen years in prison." *Id.* at 2. However, aggravated burglary (O.R.C. §2911.11) is a first degree felony under Ohio law and requires imposition of an indefinite sentence with a maximum term of *twenty-five* not fifteen years.

Some jurists have expressed concern about the adequacy of the procedures in these cases. For example, in *State v. Saunier & DeVille* (5-27-83) Col. App. No. 82-C-64 & 65, unreported, appellate counsel jointly represented both defendants. Counsel could find no issues in the record and moved to withdraw. In a two to one decision DeVille's conviction was affirmed but Saunier's conviction was reversed for want of any evidence connecting him with the crime. The dissenter would have denied counsel's motion to withdraw and required that the case be briefed.[18]

B. *The "independent review" conducted by the court is, by itself, an inadequate substitute for strict compliance with Anders.*

The Ohio Supreme Court has never decided a case construing *Anders* and establishing Ohio procedures. Two reported cases appear to require nominal compliance with *Anders*. See *State v. Duncan* 23 Ohio App. 2d 203 (1978);

[18]*See also State v. Watts* (9-27-85) Lucas App. No. L-84-218 (conviction affirmed by a 2 - 1 vote); *State v. Foley* (9-20-85) Lucas App. No. L-85-076 (conviction affirmed by a 2 - 1 vote); *State v. Townsend* (8-5-83) Lucas App. No. L-79-090 (conviction affirmed with only 2 judges participating); *State v. Monroe & Scott* (2-5-85) Scioto App. Nos. 1335 & 1336, (conviction affirmed over dissent with opinion).

State v. Toney 23 Ohio App. 2d 203 (1970). In practice, however, strict compliance is not required by at least half the appellate districts.[19] The appellate courts generally seek to substitute the "independent review" procedure for the briefing process even though *Anders* clearly requires both. See, for example, *Freels v. Hill*, No. 87-3016, slip op. (6th Cir. April 6, 1988) discussed *infra; State v. Ridner* (6-24-84), Mont. App. No. CA8648, unreported.

In *State v. Toney* the seventh appellate district interpreted *Anders* as requiring "conscientious examination" of the record by counsel. An *Anders* brief and motion are filed when counsel, "... with long and extensive experience in criminal practice..." concludes the appeal frivolous and without an issue, " ... which could be arguably supported on appeal ...". *Toney* at headnotes. The court then will independently review the record, allowing *pro se* participation if the appellant chooses, in order to determine whether the appeal is wholly frivolous. If it is determined wholly frivolous a motion for new counsel is denied, the motion to withdraw is granted and the judgment of the trial court is affirmed.

However, the seventh appellate district has been unable to consistently apply these procedures. See *State v.*

[19]See Appendices A-G. In addition, the Tenth Appellate District required strict compliance with *Anders* only after the Federal District Court for the Southern District of Ohio granted a Writ of Habeas Corpus in favor of an indigent appellant whose attorney filed a "no merit" brief in his behalf which raised no issues and did not explain why the appeal was frivolous. *Laws v. Jago*, No. C-1-78-64, U.S. Dist. Court, S.D. Ohio, W.D. (Feb. 25, 1980). In the Eighth Appellate District (Cuyahoga County) the County Public Defender's Office simply does not file *"Anders"* briefs at the informal request of the Appellate Court. Both Franklin and Cuyahoga counties now informally follow the Idaho "no withdrawal" rule. *State v. McKenney*, 98 Idaho 551, 568 P. 2d 1213 (1978).

Saunier & DeVille, supra. In several cases since 1981 the court has found arguable issues in the record but failed to require briefs from counsel.[20] Nor has the court's "independent review" always included the entire record. In *State v. Scott* (8-7-87) Bel. App. No. 86-B-35, unreported, the court did not review the transcript of the preliminary hearing. It was not included in the record on appeal. This omission was used to overrule appellant's *pro se* assignment referring to that hearing. *Id.* at 6-7. In *Village of Columbiana v. Bussard* (4-27-87) Col. App. No. 86-C-14, unreported, the court independently reviewed the D.U.I. conviction. The record contained only a "statement of facts in lieu of transcript". Counsel sought leave to withdraw. Appellant filed a letter *pro se* contradicting the "approved statement" in certain particulars. The court overruled one "potential assignment of error" (*Id.* at 4) on the basis of waiver. The court noted that the "statement of facts in lieu of transcript" contained no opinion testimony that appellant had been driving while intoxicated. Nevertheless, the court presumed, "... regularity on the part of the trial court", leave to withdraw was granted and the judgment of conviction affirmed. *Id.* at 5.

Anders requires an independent review the case to determine whether the appeal is in fact frivolous. The court must first have the benefit of counsel's brief directing it to anything in the record that could give rise to a colorable claim. However, the Ohio courts have put too great a burden on their independent review. The first appellate

[20]See *State v. Wright* (12-13-85) Col. App. No. 84-C-56; *State v. McHenry* (6-17-86) Harr. App. No. 394; *State v. Smothers* (4-23-86) Bel. Nos. 84-B-51 & 52; *State v. Valentine* (1-24-86) Col. App. No. 85-C-15; *State v. Bowers* (10-20-83) Jeff. App. No. 82-J-8; *State v. Malmsberry* (6-17-83) Col. App. No. 82-C-54; *State v. Hocker* (7-15-81) Bel. App. No. 80-B-23; *State v. Salina* (3-31-81) Col. App. No. 80-C-24.

district has allowed appointed counsel in forty cases since 1981 to file "briefs" containing factual discussions but no argument whatsoever.[21] In some cases the client's *pro se* letter or brief is appended. Arguable claims were identified in some of these cases. However, the court proceeded to rule on the merits without requiring briefs. Further, in each of these cases the court specifically found that, "... there were reasonable grounds for this appeal ..." and allowed, "no penalty".

The Sixth Circuit Court of Appeals has recently condemned the procedure employed by the Hamilton County Court of Appeals. In *Freels v. Hill,* No. 87-3016, slip op. (6th Cir. April 6, 1988), the District Court had dismissed the petition seeking federal habeas relief which claimed violation of the right to effective assistance of counsel on direct appeal. The District Court required proof of prejudice, found none and denied relief. The Sixth Circuit expressly rejected a proof of prejudice requirement and reversed the District Court. The opinion makes specific reference to the fact that the first appellate district does not require compliance with *Anders:*

> It is our observation that Freel's case is unfortunately not unique and that the advantages and requirements of *Anders,* although straight-forward, are often ignored.

Id. at 12.

As Appendix A illustrates, there is factual support for the Circuit Court's observation. But, the problem is by no means confined to Hamilton County. The twelfth appellate district is far less consistent than the first in requiring

[21]See Appendix A.

briefs prior to the independent review.[22] In addition, several cases proceeded to decision with but one brief having been filed.[23] As in the first appellate district, these cases also contain specific factual findings that, "...there were reasonable grounds for this appeal...".[24]

Amicus have found no case where the court, identified a nonfrivolous issue and required briefing prior to rendering a decision on the merits. Additionally a substantial number of cases deemed "frivolous" by counsel and accepted as such by the reviewing court appear to present some colorable or arguable claim simply from the court's own description of the case in the opinion. These cases are identified in Appendices A - G by an † at the end of the citation.

C. *The effect of noncompliance is a de facto denial of direct appeal which impacts disproportionately on indigent appellants.*

The system of justice in this country is adversarial. This is a first principle and not subject to rational dispute. Where an issue is fairly joined, the court determines the justice of the matter with the law and facts provided by the adversaries in support of their respective positions. The process is particularly important to the appellant in a criminal case who bears a heavy burden when seeking to set aside his conviction. But when counsel is required neither to initially brief the case nor subsequently to address issues

[22]See Appendix G.

[23]See eg. *State v. Elam* (8-4-86) But. App. No. CA 86-02-023; *State v. Dingus* (4-14-86) Mad. App. No. CA 85-11-035; *State v. Gilbert* (9-8-86) Cle. App. No. CA 86-02-013; *State v. Osborne* (9-30-85) War. App. No. CA 85-04-019; *State v. Denny* (1-17-84) But. App. No. CA 83-06-056; *State v. Twyman* (2-21-84) Fay. App. No. CA 83-10-022.

[24]See *Freels (supra)* at 13, n. 5.

determined to be nonfrivolous, the process loses its adversarial character.[25]

Because the vast majority of these cases are indigent appeals, the process clearly weighs most heavily against those least able to defend themselves. In fact, counsel for Amicus have not been able to document a single instance where a retained attorney has found the client's appeal to be wholly frivolous and moved to withdraw. The suggestion that the *Anders* procedure gives the indigent appellant an advantage over the monied appellant[26] is an ivory tower hypothesis. The stark reality is the mass of faceless appeals abandoned by counsel and disposed of by the court with a flick of the pen. The experience in Ohio over the last seven years unequivocally proves that poverty is no advantage on appeal.

[25]As documented in Appendix G in the twelfth appellate district alone merit decisions were reached in some thirty cases where but one "brief" was filed. These briefs are in fact "no merit letters" akin to what was filed in Penson's behalf and was specifically disapproved in *Anders v. California.* See briefs lodged with the Clerk in the following cases: *State v. Gilbert* (9-8-86) Cle. App. No. CA86-02-013; *State v. Barnes* (11-13-84) Cle. App. No. CA84-04-033; *State v. McClendon* (5-25-83) Cle. App. No. 83-01-003; *State v. McHaffie* (4-13-86) Cle. App. No. CA 1181; *State v. Cisco* (6-18-84) Cle. App. No. CA84-01-002; *State v. Alsip* (1-30-84) Cle. App. No. 83-07-061; *State v. Gregory* (2-10-82) Cle. App. No. 1020; *State v. Kendrick* (5-4-83) Cle. App. No. 1182; *State v. Cox* (10-29-84) Cle. App. No. CA84-04-034.

[26]See Comment, *Constitutional Law - Criminal Appellate Procedure - Right to Counsel,* 2 Whittier L. Rev. 757, 772 (1980)

II. The Definition Of A "Frivolous Appeal" Has Been Expanded To Encompass All Issues Which, In Counsel's Opinion, Are Unlikely To Result In Reversal On Appeal.

In Ohio practice the working definition of a "frivolous appeal" is an appeal in an indigent's case which, in counsel's opinion, contains no issue that is likely to result in reversal of the conviction.[27] In the course of researching this issue counsel have reviewed over two hundred unreported decisions. In a large number of cases it is impossible to glean any information from the "opinion" or "decision" of the reviewing court. However, in those cases with factual discussions, counsel for Amicus have identified a substantial number[28] containing issues which are clearly litigable. Of course these issues are unlikely to succeed. But that fact adds nothing to the discussion. The vast majority of all appeals from convictions are affirmed. Stating that an issue on appeal is unlikely to result in reversal is but another way of identifying the appellant as the defendant at trial.

The expansion of the definition of frivolity has been assisted by the appellate courts. Numerous decisions and opinions have either indirectly[29] or directly held the appeal

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[27]See *State v. Paker* (1-30-87) Lucas App. No. L-86-240, unreported, "... counsel for appellant has set forth two issues ... but has concluded ... that an appeal based thereon would not be meritorious and as a result would be wholly frivolous." *Id.* at 2. See also cases cited at n.30 *infra.*

[28]See Appendices A - G.

[29]As noted *supra* every decision in both the first and twelfth appellate district contains a determination by the court that there were reasonable grounds for the appeal. Yet in none of these cases was counsel directed to brief an issue either raised *pro se* or identified by the court. It would appear then that an appeal is frivolous (as concluded by counsel) so long as the conviction is not reversed by the court. Apparently it is

(Continued on next page)

frivolous because the issue did not require reversal. Thus, in *State v. Jordan* (3-20-87) Wood App. No. WD-86-45, unreported, counsel filed a motion to withdraw and a brief which directed attention; to various rulings on defense objections, to manifest weight of the evidence, and to the effectiveness of trial counsel. Appellate counsel had also represented appellant at trial. Not surprisingly then, the merit brief argued that the erroneous rulings were harmless, the evidence was sufficient, "though not overwhelming" (*Id.* at 3) and that the assistance he had provided to his client satisfied the Sixth Amendment. The reviewing court agreed that the trial court's admission of hearsay was harmless error, that the evidence was sufficient, and that while, "... the prosecution's repeated references to Jordan's prior convictions ... do appear excessive, we find that such references were not prejudicial." *Id.* at 3. Having thus disposed of the case the court concluded, "... that counsel's arguable bases [sic] for appeal are without merit. Accordingly, the appeal is frivolous and counsel's request for leave to withdraw is hereby granted." *Id.* at 4-5.[30]

(Continued)
possible for an appeal to be frivolous even when the court does reverse the conviction. See *State v. Johnson* (1st App. Dist.) discussed *supra* at n. 12.

[30]See also *State v. Lutchey* (1-30-87) Lucas App. No. L-86-145; *State v. Lee* (1-24-86) Lucas App. No. L-85-250; *City of Toledo v. Foley* (9-20-85) Lucas App. No. L-85-076; *State v. Garcia* (6-7-85) Wood App. No. 84-CR-63; *State v. Fletcher* (1-25-85) Erie App. No. E-84-13; *State v. Brewster* (6-29-84) Lucas App. No. L-84-070; *State v. Sorrell* (9-30-83) Sand. App. No. S-83-12; *State v. Townsend* (8-9-83) Lucas App. No. L-79-090; *State v. Monroe* (6-17-83) Lucas App. No. L-83-055; *State v. King* (1-21-83) Lucas App. No. L-82-292; *State v. Taylor* (12-17-82) Lucas App. No. L-82-092; *State v. Toyer* (5-7-82) Lucas App. No. L-81-358; *State v. Moore* (3-6-81) Lucas App. No. L-80-214.

In some cases counsel has been allowed to withdraw upon concluding that the case contained, "...no meritorious, appealable issue...".[31] In these cases the court substitutes its independent review of the record for the advocacy required by *Anders.*

The effect of routinely allowing appointed counsel to withdraw in these cases is significant. The right of an indigent appellant to an active advocate to advance his cause on direct appeal is substantially restricted when it is guaranteed only in those cases warranting reversal. This is clearly the trend, however. In *State v. Belton* (11-27-87) Mont. App. No. 10037, unreported, withdrawal by counsel was permitted where it appeared, "...the only possible issues bearing some arguable merit would have been harmless beyond a reasonable doubt." *Id.* at 1. In *State v. Sykes* (1-26-84) Mah. App. No. 82-CA-115, unreported, counsel was allowed to withdraw after concluding that there was, "...no arguable prejudicial error..." in the case.

And in the twelfth appellate district appointed counsel are routinely granted permission to withdraw where it appears that there are, "...no errors in the proceedings below that are prejudicial to the rights of the appellant...".

[31]*See, e.g., State v. Ridner* (6-22-84) Mont. App. No. 8648; *State v. Chapman* (2-16-84) Mont. App. No. 8129; *State v. Brewer* (6-26-84) Mont. App. No. 8661; *State v. Crockett* (2-17-84) Mont. App. No. 8180; *State v. Ellis* (9-17-84) Mont. App. No. 8800; *State v. Wilson* (12-9-85) Mont. App. No. 1942; *State v. Ysaguirre* (3-21-86) Sand. App. NO. 84-CR-906; *State v. Foley* (9-20-85) Lucas App. No. L-85-076; *State v. Lutchey* (1-30-87) Lucas App. No. L-86-145; *State v. Paker* (1-30-87) Lucas App. No. L-86-240; *State v. Rolins* (9-30-86) Lucas App. No. L-86-051.

This language is present in every case listed in Appendix G.[32]

III. A Frivolous Appeal Is An Appeal Where There Is No Issue Whatsoever Supported By The Factual Or Procedural History Of The Case Which Is Arguable Or Colorable, And Where The Case Is Not Of Sufficient Stature To Warrant Argument For A Change In Settled Law. An Appeal Is Not Frivolous Simply Because The Issue Is, In Counsel's Opinion, Unlikely To Succeed.

The Court in *Anders* did not define the phrase "frivolous appeal". The working definition employed by appointed counsel in Ohio is that a frivolous appeal is one in which the appellate court is unlikely to reverse. In this case, which is not atypical, Penson's appellate counsel found in his review of the record no errors requiring reversal, modification, and/or vacation of the verdict or sentence; he then certified that the appeal was meritless. *Amicus curiae* submits that a frivolous appeal, as contemplated in *Anders,* should not be equated with an appeal in which a criminal conviction is unlikely to be reversed. This Court should provide guidance to the lower courts and the appellate bar on the indicia of a frivolous appeal.

After *Anders* courts and commentators have wrestled, with mixed results, with the concept of frivolous appeals. Some see *Anders* as having distinguished between merely meritless appeals (from which counsel may not withdraw) and wholly frivolous cases (from which counsel may withdraw.) See, *e.g.* 1 ABA Standards for Criminal Justice,

[32]Each of these cases also contains a finding by the court that "...there were reasonable grounds for this appeal." Cases containing this language are identified in the Appendices by an asterisk following the citation.

Standard Ch. 4, §4 - 8.3 Commentary at 4 - 110 (2d Ed. 1980); Pengilly, *Never Cry Anders,* 9 Crim. Just. J. 45, 50 (1986). Others either reject this reading of *Anders,* see Note, *Withdrawal of Appointed Counsel from Frivolous Indigent Appeals,* 49 Ind. L.J. 740, 747 and n. 32 (1974); *State v. Horine,* 64 Or. App. 532, 669 P. 2d 797, 801-02 and n. 3 (1980), or find the distinction too fine, *Sanchez v. State,* 85 Nev. 95, 98, 450 P. 2d 793, 795 (1969); Hermann, *Frivolous Criminal Appeals,* 47 N.Y.U.L. Rev. 701, 705 (1970), or nonexistent. *Cleghorn v. State,* 55 Wisc. 2d 466, 475, 198 N.W. 2d 577, 582 (1972); *Pengilly, supra.* This disparity in interpretation of *Anders* has resulted in unequal treatment of indigent appellants depending upon where the "frivolous" line is drawn by the local courts. Much of the criticism of *Anders* would be blunted by this Court's clarification of the meaning of "wholly frivolous" cases. This Court needs to provide a meaningful basis for distinguishing "frivolous" cases from those which must be briefed on the merits by counsel. See *Hermann, supra* at 718, 721.

In a case which preceded *Anders,* this Court stated that if a criminal appellant made a rational argument on either the law or the facts, the appeal was not frivolous. *Coppedge v. United States,* 369 U.S. 438, 448 (1962). See Comment, *Constitutional Law -Criminal Appellate Procedure - Right to Counsel,* 2 Whittier L.R. 757, 766, 767 (1980). The litigant need not show that he was likely to prevail ultimately. *Id. Coppedge* presents in its simplest form, the test that *amicus* urges this Court to adopt. See also *State v. Horrine, supra* (a non-frivolous issue is one "for which a reasonable argument can be made, including suggested changes in the law.")

In a widely cited article, *Hermann* discusses the concept of frivolous appeals consistently with the *Coppedge* formulation. *Frivolous Criminal Appeals,* 47 N.Y.U.L. Rev. 701 (1970). *Hermann* provides a concrete description of a frivolous appeal (*Id.* at 707):

> It is an appeal with all or most of the following attributes: It is a loser, not just a probable loser, but a clearly hopeless loser, in the judgment of counsel who has read the record and researched the law. The record contains few, if any, motions or objections by defense counsel. No novel matter of constitutional law or statutory interpretation was raised below or is presented by the facts. The evidence of guilt is so overwhelming that most errors, even if clearly shown to be such, would have to be regarded as harmless ones. There is no evidence on or outside the record of official misconduct or overreaching tactics by the police or prosecution. Nothing which might strike a sympathetic chord in a reasonable person, either with regard to the defendant's character or his involvement in the crime, is presented by the facts of the case. The only matters even tenuously assignable as error are evidentiary rulings which pertain to matters of small consequence, were not objected to in the trial court or can be faulted only by an abstruse exegesis of the law. During the trial, the judge did not conduct himself unseemingly or as an advocate for the prosecution; later, he delivered without objection a bland, technical charge to the jury, not attempting to marshal the evidence on either side. [Footnotes omitted.]

Hermann criticizes other proposed tests of frivolity as too broad. The test should not be merely that counsel is subjectively unimpressed with the merits of the case or that counsel believes the conviciton will be affirmed by the

appellate court. *Id.* at 706. The odds of a criminal defendant winning a reversal on appeals are too high for the employment of an outcome - determinative test.

A frivolity test drawn from *Coppedge* would be consistent with the appellate attorney's ethical obligations to refrain from advancing frivolous claims to the court. See Ohio Code of Professional Responsibility (1970), Ethical Consideration EC 7-4:

> The advocte may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

See also DR 7-102:

> (A) In his representation of a client, a lawyer shall not:
>
> (2) Knowlingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

Cf. DR. 2-110 (1979). Under the *Coppedge* test appellate counsel act ethically by filing merit briefs in cases where a rational argument can be made, and by moving to withdraw in cases where it cannot.

The approach taken by Ohio appellate courts and counsel, that a frivolous case is any case in which the conviction is unlikely to be reversed, is inconsistent with

Coppedge and has been justifiably criticized. *Hermann* at 706. Such a test is meaningless because of the low reversal rate in criminal cases. *Id.; Pengilly, supra* at 50 and n. 30. The employment of this "unlikely to prevail on the merits" test has resulted in the denial of the constitutional right to counsel on appeal for too many indigent Ohio criminal appellants.

CONCLUSION

At least half the appellate districts in Ohio do not require compliance with *Anders*. Enforcement of the constitutional right to at least minimally effective assistance of counsel on direct appeal has been lax and, in some cases, nonexistent. In addition, there has developed a clear trend on the part of both counsel and the courts to expand the definition of frivolity. The present definition comprehends any issue in an indigent's case which counsel feels bears little chance of winning reversal. This definition includes not only issues which the court would likely find meritless, but also issues which the court would find to be error albeit harmless.

There are two obvious flaws with such a definition, both of which have far reaching consequences. First, the definition turns *Anders* and the concept of frivolity on its head. Rather than being the rare exception, the vast majority of criminal appeals are properly labeled frivolous. This broader definition does nothing to solve the "dilemma" an attorney faces when complying with the briefing requirement set by *Anders*. In fact, the dilemma becomes worse because it must be faced more frequently.[33]

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[33]The definition of a frivolous appeal proposed herein eliminates the controversy surrounding the Wisconsin "discussion rule" recently considered by this Court in *McCoy v. Wisconsin*, Sup. Crt. Case No 87-

(Continued on next page)

Second, the definition destroys the adversarial character of the criminal appellate process. In so doing it eliminates the only engine for change and guarantees stagnation. If only successful appeals are nonfrivolous then there is no motivation to argue for a new or novel interpretation, or for a change in settled principles. Counsel is, in fact, ethically prohibited from doing so. The law is frozen into its present pattern, and *stare decisis* becomes the only force in the legal universe.

It is inconceivable that this Court would intend such a result. Yet, this result is the irrefutable consequence of the expanding definition of frivolity. The Ohio appellate courts have approved this definition. They have encouraged the expansion of the definition by consistently granting counsel leave to withdraw in cases with nonfrivolous issues. Independent review by an appellate court is an inadequate substitute for advocacy. This Court should act to preserve the adversarial nature of the appellate process. To do otherwise would be to change that which is most basic in our system of justice. Such a change will not benefit anyone, and could very well hurt us all.

(Continued)

5002. In a truly frivolous appeal, one does not advocate against the client because there is only one side. This will usually take the form of an explanation of the facts or procedural history, the truth of which negates the existence of a claimed issue. For example, in an appeal of a guilty plea the client might assert that he was not advised of his rights prior to waiving them. Upon review of the transcript counsel may discover that the client was in fact properly advised by the court. Where no other error is asserted or revealed, an appeal in this situation would be frivolous, counsel should so advise the court and the appeal should be dismissed after the court satisfies itself that counsel has not overlooked an issue.

Respectfully submitted,

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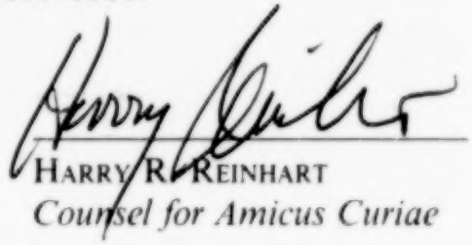
CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this Court, I Harry R. Reinhart, a member of the bar of this Court, hereby certify that on this *20th* day of *April, 1988*, three copies of the foregoing Brief for the Ohio Association of Criminal Defense Lawyers as Amicus Curiae In Support of Petitioner were mailed, first class postage paid, to Gregory Ayers, Esq., Eight East Long Street, 11th Floor, Columbus, Ohio, 43266-0587, Counsel for Petitioner; Mark B. Robinette, Esq., 20 East Tabb Street, Suite 101, Petersburg, Virginia 23803, Counsel for Respondent. I further certify that all parties required to be served have been served. Petitioner Steven Anthony Penson's address is K-3-56, #182-582, Southern Ohio Correctional Facility, P.O. Box 45699, Lucasville, Ohio 45699-0001.



HARRY R. REINHART
Counsel for Amicus Curiae

APPENDIX

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LEGEND FOR APPENDICES A THROUGH G

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

† Indicates presence of an arguable issue discernable from the opinion lodged with the Clerk.

* Indicates finding of reasonable grounds for the appeal by the court.

# Indicates State filed no brief.

° Indicates opinion contains conclusion that appeal is frivolous because the issue does not warrant reversal.

¢ Indicates split (i.e. 2-1) decision.

@ Indicates that the "no merit brief" is lodged with Clerk along with the opinion.

$ Indicates that the "independent review" was conducted by the court upon an incomplete record.

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APPENDIX A

FIRST APPELLATE DISTRICT
(Hamilton County, Ohio)

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

State v. Sexton (7-1-81) Ham. App. No. C800557†, *

State v. King (3-24-82) Ham. App. No. C810404†, *

State v. Neely (3-24-84) Ham. App. No. C810346†, *

State v. Heath (4-7-82) Ham. App. No. C810407*

State v. Bush (4-14-82) Ham. App. No. C810428*

State v. Coleman (6-2-82) Ham. App. Nos. C810497, C810499*

State v. Mitchell (6-2-82) Ham. App. No. C810548*

In re Powell (7-7-82) Ham. App. No. C810661*

State v. Gentry (7-28-82) Ham. App. No. C-810677*

State v. Jackson (8-11-82) Ham. App. No. C-810899*

State v. Browner (8-18-82) Ham. App. No. C81088*

State v. Bryant (8-25-82) Ham. App. No. C810924*

State v. Johnson (10-20-82) Ham. App. Nos. C810925, C810965*

State v. Woodrum (1-26-83) Ham. App. No. C820273*

State v. Austin (2-2-83) Ham. App. No. C820430*

State v. Steed (2-23-83) Ham. App. No. C820358*

State v. Murphy (3-16-83) Ham. App. No. C820401*

State v. Claxton (1-9-83) Ham. App. No. C820259*

State v. Morton (7-13-83) Ham. App. No. C820851*

State v. Reynolds (12-7-83) Ham. App. No. C830182*

State v. Harris (2-1-84) Ham. App. No. C830335, C830344*

State v. Campbell (2-15-84) Ham. App. No. C830366*

State v. Lainhart (4-4-84) Ham. App. Nos. C830502, C830510, C830511*

State v. Freels (4-4-84) Ham. App. No. C830585*
State v. Law (7-25-84) Ham. App. No. C830890*
State v. Parlier (9-26-84) Ham. App. No. C830543*
State v. McDermott (12-26-84) Ham. App. No. C840181*
State v. Greer (12-26-84) Ham. App. No. C840279*
State v. Burkett (2-20-85) Ham. App. No. C840031*
State v. Love (4-3-85) Ham. App. No. C840352*
State v. Green (5-9-85) Ham. App. No. C840616*
State v. Sutton (6-12-85) Ham. App. No. C840740*
State v. Taylor (9-4-85) Ham. App. No. C840912*
State v. Fairbanks (11-27-85) Ham. App. No. C850084*
State v. Robinson (1-14-87) Ham. App. No. C860223*
State v. Wilson (1-21-87) Ham. App. No. C860221*
State v. Hayes (1-30-87) Ham. App. No. C860267*
State v. Bush (2-12-87) Ham. App. No. C860352*
State v. Jackson (7-1-87) Ham. App. No. C860768*
State v. Howard (7-8-87) Ham. App. No. C860754*

APPENDIX B

SECOND APPELLATE DISTRICT
(Darke, Miami, Champaign, Clarke, Greene & Montgomery Counties, Ohio)

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

State v. Humphrey (6-24-83) Clark App. No. 1799
State v. Chapman (2-16-84) Mont. App. No. 8129
State v. Crockett (2-17-84) Mont. App. No. 8180 @, *
State v. Ridner (6-22-84) Mont. App. No. 8648 @, *
State v. Wilson (7-25-84) Clark App. No. 1776
State v. Pearson (8-7-84) Greene App. No. 83-CA-67, *
State v. Brewer (9-26-84) Mont. App. No. CA 8661, @
State v. Ellis (9-27-84) Mont. App. No. 8800, *
State v. Wilson (12-9-85) Clark App. No. CA-2060
State v. Day (11-24-86) Clark App. No. CA-2141, *
State v. Seebeck (5-14-84) Clark App. No. CA-2243, *
State v. Penson (6-5-87) Mont. App. No. CA-9193, *
State v. Penson (6-9-87) Mont. App. No. CA-9193, *
State v. Riggins (6-17-87) Clark App. No. CA-2305
State v. Tooson (6-18-87) Clark App. No. CA-2137
State v. Rhyan (6-18-87) Clark App. No. CA-2213
State v. Glascoe (1-27-87) Mont. App. No. 10221, @
State v. Smith (8-10-87) Mont. App. No. 9818, @
State v. Dorton (11-25-87) Mont. App. No. 10082, @
State v. Monroe (11-27-87) Mont. App. No. 10124, @
State v. Hefflin (1-26-88) Mont. App. No. 10456

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APPENDIX C

FOURTH APPELLATE DISTRICT
(Pickaway, Hocking, Athens, Washington, Ross, Vinton, Meigs, Highland, Pike, Jackson, Gallia, Adams, Scioto & Lawrence Counties, Ohio)

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

State v. Monroe (2-5-82) Scioto App. No. 1335, †

State v. Scott (2-5-82) Scioto App. No. 1336

State v. Grove (3-12-82) Wash. App. No. 79-CA-26

State v. Kilgore (8-25-82) Athens App. No. 1108

State v. Burke (10-2-82) Gallia App. No. 81-CA-9, †

State v. Caldwell (11-10-82) Ross App. No. 924

State v. Crestinger (2-9-83) Ross App. No. 948, †

State v. Campbell (7-28-83) Wash. App. No. 81-X-11, †

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APPENDIX D

FIFTH APPELLATE DISTRICT
(Richland, Ashland, Holmes, Stark, Morrow, Knox, Coshocton Tuscarawas, Delaware, Licking, Muskingum, Guernsey, Fairfield, Perry & Morgan Counties, Ohio)

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

State v. Parrish (11-4-86) Knox App. No. 86-CA-12

State v. Mann (11-10-86) Stark App. No. CA-6923

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APPENDIX E

SIXTH APPELLATE DISTRICT
(Erie, Huron, Williams, Fulton, Wood, Ottawa Sandusky & Lucas Counties, Ohio)

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

State v. Graddy (2-13-81) Lucas App. No. L-80-203, °
State v. Moore (3-6-81) Lucas App. No. L-80-214, †, °
State v. Rogers (3-27-81) Lucas App. No. L-80-217, †
State v. Cooper (5-22-81) Lucas App. No. L-80-327
State v. Dotson (12-24-81) Lucas App. No. L-81-19
State v. Gregory (12-24-81) Lucas App. No. L-81-197, †
State v. Hartsel (4-30-82) Sandusky App. No. S-81-37, †
State v. Toyer (5-7-82) Lucas App. No. L-81-358, †, °
State v. Simms (7-30-82) Wood App. No. WD-82-26
State v. Crenshaw (11-19-82) Lucas App. No. L-82-179, †
State v. Taylor (12-17-82) Lucas App. No. L-82-092, °
State v. King (1-21-83) Lucas App. No. L-82-292, †, °
State v. Cann (6-3-83) Lucas App. No. L-83-068
State v. Monroe (6-17-83) Lucas App. No. L-83-055, °
State v. Townsend (8-5-83) Lucas App. No. L-79-080, †, °
State v. Sorrell (9-30-83) Sandusky App. No. S-83-12, †, °
State v. Brewster (6-29-84) Lucas App. No. L-84-070, °
State v. Duck (7-6-84) Lucas App. No. L-83-390
State v. Hickman (1-25-85) Erie App. No. E-84-13, †, °
State v. Fletcher (4-26-85) Lucas App. No. L-84-161, °
State v. Garcia (6-7-85) Wood App. No. WD-84-99, °
City v. Foley (9-20-85) Lucas App. No. L-85-076, †, °
State v. Watts (9-27-85) Lucas App. No. L-84-218, †, ¢
State v. Lee (1-24-86) Lucas App. No. L-85-250, †, °
State v. Fisher (2-21-86) Lucas App. No. L-85-274, °
State v. Barnett (3-21-86) Wood App. No. WD-85-63

State v. Ysaguirre (3-21-86) Sandusky App. No. S-85-31, °

State v. Harget (6-20-86) Lucas App. No. L-85-367, #

State v. Burns (6-20-86) Lucas App. No. L-85-368, #

State v. Rollins (9-30-86) Lucas App. No. L-86-051, #

State v. Robinson (12-5-86) Sandusky App. No. S-86-33, †

State v. Paker (1-30-87) Lucas App. No. L-86-240, †, °

State v. Lutchey (1-30-87) Lucas App. No. L-86-145, °

State v. Jordan (3-20-87) Wood App. No. WD-86-45, †, °

APPENDIX F

SEVENTH APPELLATE DISTRICT
(Mahoning, Columbiana, Carroll, Jefferson, Harrison Belmont, Noble & Monroe Counties, Ohio)

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

State v. Salina (3-31-81) Col. App. No. 80-C-24, †

State v. Carlisle (4-29-81) Mah. App. No. 79-CA-151

State v. Cunningham (6-4-81) Col. App. No. 80-C-35

State v. Earich (7-14-81) Col. App. No. 79-C-62

State v. Hocker (7-15-81) Bel. App. No. 80-B-23

State v. Jackson (2-18-82) Col. App. No. 81-C-42

State v. Wallace (5-20-82) Col. App. No. 81-C-19

State v. Johnson (12-21-82) Col. App. No. 82-C-11, †

State v. Saunier (5-27-83) Col. App. No. 82-C-64, †, ¢

State v. DeVille (5-27-83) Col. App. No. 82-C-65, †

State v. Hess (6-6-83) Mah. App. No. 81-CA-152

State v. Malmsberry (6-17-83) Col. App. No. 82-C-54, †

State v. Neville (7-18-83) Col. App. No. 82-C-70

State v. White (10-25-83) Col. App. No. 82-C-66, †

State v. Sykes (1-26-84) Mah. App. No. 82-CA-115, †

State v. Loy (7-31-85) Bel. App. No. 84-B-42

State v. Wright (12-13-85) Col. App. No. 84-C-56

City v. Valentine (1-24-86) Col. App. No. 85-C-15, †

State v. Smothers (4-23-86) Bel. App. No. 84-B-51, †

State v. McHenry (6-20-86) Har. App. No. 394, †

State v. Hill (3-31-87) Col. App. No. 85-C-30, †, °

Vill. of Col. v. Bussard (4-27-87) Col. App. No. 86-C-14, †, $, °

State v. London (4-28-87) Col. App. No. 86-C-24

State v. Myers (5-14-87) Bel. App. No. 86-B-20

State v. Malin (7-23-87) Bel. App. No. 86-B-15

State v. Scott (8-6-87) Mah. App. No. 86-CA-17
State v. Scott (8-7-87) Bel. App. No. 86-B-35, $
State v. Esposito (9-11-87) Bel. App. No. 86-B-9

APPENDIX G

TWELFTH APPELLATE DISTRICT
(Madison, Fayette, Preble, Butler, Warren, Clinton, Clermont & Brown Counties, Ohio)

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

State v. Rhodes (4-1-81) But. App. No. CA80-05-0052, *
State v. Litteral (12-16-81) Fay. App. No. 21-CA-7, *, #
State v. Mullins (1-20-82) But. App. No. 81-02-0019, *
State v. Gregory (2-10-82) Cler. App. No. 1020, @, *
State v. Braxton (2-10-82) Fay. App. No. 81-CA-12, *, #
State v. Gregory (3-31-82) But. App. No. CA81-08-0067, *
State v. Reisinger (10-27-82) Clin. App. No. 428, *
State v. Gayhart (10-27-82) But. App. No. CA81-07-0062, *
State v. Aills (12-8-82) Fay. App. No. 82-CA-7, *, #
State v. Harris (12-8-82) But. App. No. 82-02-0014, *
State v. Yates (12-8-82) War. App. No. 82, *
State v. Barker (12-8-82) War. App. No. 96, *, #
State v. Cicco (12-22-82) Fay. App. No. 82-CA-12, *, #
State v. Jackson (12-30-82) But. App. No. CA82-01-0007, *
State v. Nooks (1-19-83) Mad. App. No. 755, *, #
State v. McHaffie (4-13-83) Cler. App. No. 1181, @
State v. Fuhr (4-20-83) War. App. No. 112, *
State v. Napper (4-27-83) Mad. App. No. 788, *, #
State v. Kendrick (5-4-83) Cler. App. No. 1182, @, *
State v. Skidmore (5-4-83) War. App. No. 125, *, #
State v. Abney (5-25-83) War. App. No. 123, *, #
State v. McClendon (5-25-83) Cler. App. No. 83-01-003, @, *

State v. Burton (6-15-83) But. App. No. CA82-07-0081, *

State v. Profitt (8-31-83) But. App. No. 83-03-023, *

State v. Yonas (8-31-83) War. App. No. CA-124, *, †

State v. Levine (9-14-83) War. App. No. CA83-05-034, *

State v. Robinson (11-30-83) But. App. No. 83-06-075, *

State v. Denney (1-17-84) But. App. No. CA83-07-084, *

State v. White (1-23-84) But. App. No. CA83-06-056, *

State v. Brannock (1-23-84) War. App. No. 83-10-074, *

State v. Alsip (1-30-84) Cler. App. No. 83-07-061, @, *

State v. Taryman (2-21-84) Fay. App.
No. CA83-10-022, *, #

State v. Myer (4-30-84) War. App. No. CA83-12-093, *

State v. Cisco (6-18-84) Cler. App.
No. CA84-01-002, @, *

State v. Payton (6-18-84) Fay. App.
No. CA84-02-002,*, #, †

State v. Perkins (8-20-84) Fay. App. No. C84-03-004, *

State v. Cox (10-29-84) Cler. App.
No. CA84-04-034, @, *

State v. Torter (10-29-84) But. App.
No. CA84-01-005, *, #

State v. Barnes (11-13-84) Cler. App.
No. CA84-04-033, @, *

State v. Couch (11-19-84) War. App.
No. CA84-07-042, *, #

State v. Steward (12-31-84) Fay. App.
No. CA84-10-011, *, #

State v. Noble (2-25-85) Fay. App. No. CA84-11-014, *, #

State v. Adams (9-30-85) War. App. No. 85-04-019, *, #

State v. Taylor (2-28-86) War. App.
No. CA85-11-082, *, #

State v. Dingus (4-14-86) Mad. App.
No. CA85-11-035, *, #

State v. Elam (8-4-86) But. App. No. CA86-02-023, *, #

State v. Gilbert (9-8-86) Cler. App.
No. CA86-02-013, @, *, #

State v. Thompson (9-15-86) Mad. App.
No. CA86-05-009, *, #

State v. Grinnell (9-22-86) Preble App.
No. CA86-04-010, *, #

State v. Osborne (9-30-85) But. App.
No. CA83-07-084, *, #

State v. Birchfield (12-8-86) But. App.
No. CA86-07-099, *, #

State v. Jones (12-15-86) War. App.
No. CA86-04-028, *, #

State v. Woods (12-22-86) War. App.
No. CA86-08-085, *, #

State v. Peterson (8-24-87) War. App.
No. CA87-02-016, *, #

State v. Blackwell (9-21-87) War. App.
No. CA87-03-027, *, #

State v. Lees (9-28-87) Preble App.
No. CA87-06-017, *, #

State v. Fredericks (9-28-87) But. App.
No. CA87-06-084, *, #